

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SONNY STEELE and AMLA W. STEELE,

No. 12-cv-05054 RS

Plaintiffs,

v.

**ORDER GRANTING MOTION TO
DISMISS**

FIRST MAGNUS FINANCIAL
CORPORATION, et al.,

Defendants.

I. INTRODUCTION

Plaintiffs filed a Second Amended Complaint (“SAC”) for damages and injunctive relief arising from an alleged threatened foreclosure of their home. The SAC asserts ten claims for relief that are substantially similar to the ten claims brought in the previously dismissed First Amended Complaint (“FAC”). Defendants Bank of America and Mortgage Electronic Registration Systems, Inc. (“MERS”) bring this motion to dismiss for lack of standing, failure to state a claim upon which relief can be granted, and the applicable statutes of limitations. Pursuant to Civil Local Rule 7-1(b), this matter is suitable for decision without oral argument and is submitted accordingly. For the following reasons, defendants’ motion to dismiss is granted, without leave to amend.

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II. BACKGROUND¹

2 Plaintiffs obtained a loan in the amount of \$500,000 under the subject Deed of Trust, secured
3 by the real property located at 1288 Miller Avenue, South San Francisco, California. The Deed of
4 Trust specifies the Lender is First Magnus Financial Corporation, the Trustee is Financial Title
5 Company, and the Beneficiary is MERS. Mot. Ex. A. MERS granted, assigned, and transferred all
6 beneficial interest in the Deed of Trust to ING Bank under a Corporation Assignment of Deed of
7 Trust in 2012. Mot. Ex. B. Plaintiffs claim the assignment of the Deed of Trust is void as a result
8 of fraud and lack of capacity on the part of MERS to execute a valid assignment, and they contest
9 the evidence of the transfer. As a result, plaintiffs assert they are the true owners of the Deed of
10 Trust. While plaintiffs are in default, defendants have not issued a notice of default or notice of
11 trustee's sale.

12 Plaintiffs' FAC was dismissed with leave to amend. In the SAC, plaintiffs assert
13 substantially similar claims, seeking: (1) Quiet Title; (2) Declaratory Relief; (3) Preliminary and
14 Permanent Injunction; (4) Cancellation of Instruments; (5) Violation of California Civil Code
15 § 2934(A)(1)(A); (6) Violation of the Truth in Lending Act; (7) Violation of the Real Estate and
16 Settlement Procedures Act; (8) Failure to comply with conditions precedent in the Deed of Trust; (9)
17 Unjust Enrichment; and (10) Constructive Fraud. The new assertions in the SAC primarily concern
18 whether the named defendants are valid beneficiaries of the Deed of Trust, contending that any
19 transfer to ING Bank would be invalid if it did not occur prior to First Magnus going out of business
20 in 2008. Defendants move to dismiss the SAC on the grounds that (1) plaintiffs lack standing to
21 bring the claims; (2) the complaint fails to state a claim upon which relief can be granted; and (3)
22 the claims are time-barred by the applicable statutes of limitations.

III. LEGAL STANDARD

24 A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) is evaluated
25 for plausibility. While “detailed factual allegations are not required,” a complaint must contain
26 sufficient factual allegations to “state a claim to relief that is plausible on its face.” *Ashcroft v.*
27 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 570 (2007)). A

28 ¹ Unless otherwise indicated, the following facts are taken from plaintiffs' SAC and must be accepted as true for the purposes of this motion.

1 claim is facially plausible “when the pleaded factual content allows the court to draw the reasonable
2 inference that the defendant is liable for the misconduct alleged.” *Id.*

3 Dismissal under Rule 12(b)(6) may be based on either the “lack of a cognizable legal theory
4 or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica*
5 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). When evaluating such a motion, all material
6 allegations in the pleadings are accepted as true, even if doubtful, and construed in the light most
7 favorable to the non-moving party. *Twombly*, 550 U.S. at 555-56. “[C]onclusory allegations of law
8 and unwarranted inferences[,]” however, “are insufficient to defeat a motion to dismiss for failure to
9 state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *see also Iqbal*, 556
10 U.S. at 663 (“[T]hreadbare recitals of a cause of action’s elements, supported by mere conclusory
11 statements[,]” are not taken as true). When amendment would be futile, dismissal may be ordered
12 with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

13 IV. DISCUSSION

14 A. Evidence of Transfer.

15 Plaintiffs present a technical argument that an ambiguous chain of title nullifies the
16 obligation owed to defendant ING Bank, the current beneficial interest holder. They assert there is
17 no evidence the beneficial interest was legally transferred to any named defendant prior to First
18 Magnus going out of business in 2008. They no longer dispute their obligation to make payments to
19 the party entitled to receive them, but rather contend “[d]efendants have failed to show if any of
20 them have that right.” SAC ¶ 4.

21 While plaintiffs continue to challenge the validity of MERS’s transfer of its beneficial
22 interest in the Deed of Trust, ING Bank’s receipt of that beneficial interest in 2012 is not reasonably
23 in dispute.² In dismissing the FAC, it was noted that a challenge to the securitization process is
24 allowed to proceed only when plaintiffs allege specific harm resulting from assignment of the Note.
25 *See* Dkt. 27, 4. Plaintiffs continue to allege improper procedures without averring specific harm that
26 resulted from the Note’s assignment. In that circumstance, a “plaintiff lacks standing to challenge

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28 ² As noted in dismissing the FAC, judicial notice of this transfer is appropriate, as the fact of the
transfer of the beneficial interest from MERS to ING Bank is not reasonably in dispute. *See* Dkt.
27, 2; Mot. Ex. B.

1 the process by which his mortgage was (or was not) securitized because he is not a party to the
2 PSA.” *Armeni v. Am.’s Wholesale Lender*, 2012 WL 603242 (C.D. Cal. Feb. 24, 2012).

3 Technical arguments such as those in plaintiffs’ SAC have generally been rejected as a basis
4 to invalidate the legal right to exercise the power of sale in a non-judicial foreclosure. *See, e.g.*,
5 *Hafiz v. Greenpoint Mortgage Funding, Inc.*, 652 F. Supp. 2d 1039, 1043 (N.D. Cal. 2009)
6 (“California law does not require possession of the note as a precondition to non-judicial foreclosure
7 under a deed of trust”); *Mulato v. WMC Mortgage Corp.*, No. C 09-03443 CW, 2010 WL 1532276
8 at *2 (N.D. Cal. Apr. 16, 2010) (same). Courts have “summarily rejected the argument that
9 companies like MERS lose their power of sale pursuant to the deed of trust when the original
10 promissory note is assigned to a trust pool.” *Benham v. Aurora Loan Servs.*, No. C-09-2059 SC,
11 2009 WL 2880232, at *3 (N.D. Cal. Sept. 1, 2009). In fact, plaintiffs’ arguments are at odds with
12 the Restatement on the subject, which states,

13 It is conceivable that on rare occasions a mortgagee will wish to dissociate the
14 obligation and the mortgage, but that result should follow only upon evidence that
15 the parties to the transfer so agreed. The far more common intent is to keep the two
16 rights combined. Ideally a transferring mortgagee will make that intent plain by
17 executing to the transferee both an assignment of the mortgage and an assignment,
18 indorsement, or other appropriate transfer of the obligation. But experience
suggests that, with fair frequency, mortgagees fail to document their transfers so
carefully. This section’s purpose is generally to achieve the same result even if one
of the two aspects of the transfer is omitted.

19 Restatement (Third) of Property (Mortgages) § 5.4 cmt. a (1997). The Restatement thus makes
20 clear that such careless transfers and assignments will not affect the validity of the underlying debt
21 and security.

22 Plaintiffs’ assertions regarding the ambiguous chain of title present a similar technical
23 argument. In a recent foreclosure case, a borrower asserted that subsequent to the loan closing,
24 ownership of the promissory note and deed of trust changed and no clear chain of ownership
25 existed. *Roque v. Suntrust Mortgage, Inc.*, No. C-09-00040 RMW, 2010 WL 546896, *1 (N.D. Cal.
26 Feb. 10, 2010). The court noted that “[u]niformly among courts, production of the note is not
27 required to proceed in foreclosure and similarly no production of any chain of ownership is
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1 required.” *Id.* at *3. Similarly, it is immaterial whether ING Bank produces evidence regarding the
2 chain of ownership, as its current beneficial interest is clearly established.

3 Plaintiffs provide no legal authority for their assertion that the transfer is invalid if it did not
4 occur prior to First Magnus going out of business, or that they were legally entitled to receive notice
5 of the transfer. Lenders generally are permitted to transfer a debt without notifying the borrower,
6 and assignments of the beneficial interest in a debt commonly are not recorded. *See Herrera v. Fed.*
7 *Nat. Mortgage Ass’n*, 205 Cal. App. 4th 1495, 1506 (2002). Furthermore, plaintiffs consented to
8 receive no notice of the transfer, included as an express term in the Deed of Trust. *See Mot. Ex. A,*
9 11 (“The Note or a partial interest in the Note (together with this Security Instrument) can be sold
10 one or more times without prior notice to Borrower.”). Accordingly, lack of notice is insufficient to
11 provide a basis for plaintiffs’ claims.

12 Plaintiffs’ new averments continue to rely on technical issues related to the chain of title.
13 This Court’s prior order made clear that such reliance is insufficient to state a claim. It therefore
14 appears that further amendment would be futile. Accordingly, Claims One, Two, Four, Five, Six,
15 and Nine, which solely arise out of the securitization process, are dismissed without leave to amend.

16 **B. Injunctive Relief.**

17 Plaintiffs’ identical claim for injunctive relief was stricken without leave to amend from the
18 FAC. As previously noted, injunctive relief is a remedy, not a claim for relief. Accordingly, Claim
19 Three is dismissed without leave to amend.

20 **C. RESPA.**

21 Plaintiffs fail to state a claim under RESPA, as they are unable to show they submitted a
22 Qualified Written Request to defendants. *See* 12 U.S.C. § 2605(e); *Jensen v. Quality Loan Serv.*
23 *Corp.*, 702 F. Supp. 2d 1183, 1196 (E.D. Cal. 2010) (dismissing a RESPA claim under § 2605
24 where plaintiff failed to show submission of a Qualified Written Request). Nevertheless, plaintiffs
25 assert disclosure was required for information related to the servicing of the loan, irrespective of
26 whether they submitted a Qualified Written Request. The code provision upon which they rely,
27 however, addresses the loan servicer’s obligation to respond to a written notice of error from the
28 borrower. 12 U.S.C. § 1024.35 (“A servicer shall comply with the requirements of this section for

1 any written notice from the borrower that asserts an error . . . [such as f]ailure to transfer accurately
2 and timely information relating to the servicing of a borrower's mortgage loan account to a
3 transferee servicer."). Plaintiffs do not plead they submitted any form of written request to any
4 defendant. Moreover, this provision deals with notification related to the servicing of the loan, not
5 transfers of the beneficial interest at issue here. Defendants were not required to notify them of the
6 beneficial interest transfer, as discussed above.

7 Plaintiffs' RESPA claim also fails for two additional reasons. Congress enacted RESPA to
8 protect home buyers in the home purchasing process, covering settlement issues and the servicing of
9 mortgage loans. *Tamburri v. Suntrust Mortgage, Inc.*, 875 F. Supp. 2d 1009, 1012 (N.D. Cal.
10 2012). Plaintiffs' assertions, however, relate to changes in the beneficial interest holder, not
11 settlement or servicing of the loan. Plaintiffs cannot state a claim under RESPA through averments
12 unrelated to the statutory provisions. *See id.* at 1014 (dismissing a RESPA claim based on
13 purported damages from not receiving information on the loan's ownership, reasoning "RESPA is
14 not designed to cover disputes over the ownership and validity of a loan"). Additionally, as RESPA
15 does not provide for injunctive relief, a plaintiff must aver cognizable damages to sustain a claim.
16 *See id.* at 1013-14 ("Plaintiff's statement that she was harmed by not knowing the true owner of
17 Note . . . is insufficient to allege the pecuniary harm required by the statute."). Plaintiffs, however,
18 fail to aver cognizable damages resulting from their lack of notice. As plaintiffs continue to be
19 unable to plead facts sufficient to sustain a claim under RESPA, Claim Seven is dismissed without
20 leave to amend.

21 **D. Violations of Conditions Precedent.**

22 Plaintiffs assert defendants failed to meet conditions precedent in paragraphs 22 and 23 of
23 the Deed of Trust. First, they aver defendants did not afford plaintiffs the opportunity to cure the
24 default prior to transfer, and that since no Notice of Default was recorded due to the absence of a
25 lawful transfer, defendants were unjustly enriched. Second, they assert defendants failed to
26 reconvey the property in violation of the reconveyance provision.

27 Plaintiffs have not averred facts that would constitute a breach of the conditions in
28 paragraphs 22 or 23. Paragraph 22 provides for notice prior to acceleration of the loan following the

1 borrower's breach. Facts regarding the transfer of the beneficial interest to ING Bank, however, are
2 entirely unrelated to whether plaintiffs were given the opportunity to cure the default prior to
3 acceleration. Paragraph 23 provides for reconveyance following the payment of all sums secured by
4 the Deed of Trust. As plaintiffs do not aver they paid the sums owed, they have not pleaded factual
5 circumstances that would make failure to reconvey the property a breach of these provisions.
6 Having failed to amend this claim despite being given the opportunity to do so, it appears further
7 amendment would be futile. Accordingly, Claim Eight is dismissed without leave to amend.

8 E. Constructive Fraud.

9 Plaintiffs assert defendants acted with malice and ill will with clear intent to defraud. A
10 claim of constructive fraud, like a claim of fraud, is subject to heightened pleading requirements
11 under Rule 9(b) of the Federal Rules of Civil Procedure. *Guerrero v. Greenpoint Mortgage*
12 *Funding, Inc.*, 403 Fed. App'x 154, 156 (9th Cir. 2010). "In alleging fraud or mistake, a party must
13 state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).
14 Claims of fraud must be "specific enough to give defendants notice of the particular misconduct"
15 averred, and they "must be accompanied by the who, what, when, where, and how of the
16 misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citations
17 omitted). Assertions that do not meet this standard are stripped from the claim for failure to satisfy
18 Rule 9(b). *Id.*

19 Plaintiffs' averments do not provide a sufficient factual basis to sustain a fraud claim under
20 Rule 9(b). Plaintiffs amended their claim of constructive fraud to include a conclusory statement
21 that defendants actions are "patently fraudulent" and to challenge the sufficiency of defendants'
22 evidence that they hold a valid beneficial interest. Conclusory statements of law, however, are
23 insufficient to state a claim. *Epstein*, 83 F.3d at 1140. While plaintiffs do not aver any connection
24 between the chain of title and their claim for fraud, even had they done so, ambiguities in the chain
25 of title do not support a claim for relief, for the reasons discussed above. The continued lack of
26 specificity averred in the SAC reveals further amendment would be futile. Accordingly, and
27 incorporating the reasons articulated in the dismissal of the FAC, Claim Ten is dismissed without
28 leave to amend.

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V. CONCLUSION

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To the extent the SAC relies on the same averments and arguments dismissed in the FAC,
3 they are inadequate to state a claim for relief for the reasons provided in the previous order. *See*
4 Dkt. 27. The additional averments, primarily dealing with the validity of ING Bank's beneficial
5 interest, do not state a plausible basis for relief. Accordingly, defendants' motion to dismiss is
6 granted without leave to amend. The hearing scheduled for August 22, 2013 is vacated, and the
7 Clerk is instructed to close the case file.

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IT IS SO ORDERED.

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Dated: 8/7/13


RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

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